BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RONALD D. SMITH	)	
Claimant	)	
VS.	)	
	)	Docket Nos. 220,893 & 236,793
WATCO	)	
Respondent	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE	)	
Insurance Carrier	)	

ORDER

Claimant appealed the March 6, 2001 Award entered by Administrative Law Judge Jon L. Frobish. The Board heard oral argument on August 29, 2001.

APPEARANCES

Patrick C. Smith of Pittsburg, Kansas, appeared for claimant. Janell Jenkins Foster of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. Additionally, the record also includes those documents placed into evidence by the signed written stipulation that was filed on February 12, 2001, with the Division of Workers Compensation. Finally, the Board notes the record also contains medical records from another Ronald Smith. Those records can be identified by an August 8, 1955 date of birth or by a different patient number from those of claimant's.

ISSUES

On March 11, 1997, claimant filed an application for hearing with the Division of Workers Compensation in which he alleged that he had a general body disability as he had smashed his hand by a bar from "on or about September 3, 1996 and continuing through present." That claim was assigned Docket No. 220,893.

On September 1, 1998, claimant filed a second application for hearing and again alleged that he had sustained a general body disability from "repetitive and cumulative motion in the course of his employment" from "on or about August 5, 1998 and continuing through present." That claim was assigned Docket No. 236,793.

The two principal issues presented to Judge Frobish to decide were (1) the nature and extent of claimant's injuries and disability and (2) the average weekly wage.

In the March 6, 2001 Award, the Judge determined that claimant's injuries to both upper extremities should be treated as one accident, with the accident date being claimant's last day of working for respondent on August 23, 1999. The Judge also determined respondent offered claimant an accommodated job as a janitor but claimant considered the job demeaning and declined that offer, along with another job or jobs that required typing and using a computer. Accordingly, the Judge imputed the wage claimant allegedly would have earned at that job and thereby denied claimant's request for a work disability. The award limited claimant to a 25 percent permanent partial general disability based upon his whole body functional impairment rating. The Judge found claimant's average weekly wage on the date of accident was $444, which was based upon a rate of $11.10 per hour for a 40-hour workweek.

Claimant contends Judge Frobish erred by finding that claimant refused to accept and perform the janitorial job. First, claimant argues there is no evidence in the record the janitorial job was within his permanent work restrictions and limitations. Second, claimant argues there is no evidence that respondent offered claimant the janitorial job following his last surgery. Third, claimant contends he performed the janitorial job the only time that it was offered to him, which was before his last surgery, and two other temporary jobs offered him following his last surgery involved typing and computers for which he was neither trained nor experienced. Fourth, claimant insists the desk jobs and the Salvation Army job offered claimant were "rehabilitative" positions and were only to last a few weeks until claimant recovered and could return to his regular job duties rather than being permanent positions. Fifth, claimant argues the only job offered claimant following his last surgery for which he was qualified to perform was with the Salvation Army and that job would have paid only 70 percent of his pre-injury average weekly wage. Sixth, claimant asserts that in November 1999, after learning he would not be offered a job in respondent's tool shed, he advised respondent he would accept the Salvation Army job but was told that he had been terminated the day before. And finally, claimant argues respondent has not rehired claimant because he has work restrictions, despite being encouraged to reapply for employment.

Claimant also contends Judge Frobish erred in computing the pre-injury average weekly wage by omitting the $34 per week in fringe benefits that claimant received.

Accordingly, claimant requests the Board to grant him a work disability (a permanent partial general disability greater than the 25 percent whole body functional impairment rating) and increase the pre-injury average weekly wage from $444 to $478.

Conversely, respondent and its insurance carrier contend the Judge properly denied claimant's request for a work disability. First, they argue claimant sustained two separate scheduled injuries rather than one non-scheduled injury. They contend claimant sustained his first accident in either August or September 1996 when claimant was working with a bar and his hand slipped, slamming his right hand into the ground and causing or aggravating carpal tunnel syndrome in the right upper extremity. They contend the second accident occurred in a series of accidents ending on November 19, 1996, resulting in carpal tunnel syndrome in the left upper extremity. Next, they argue that claimant then developed ulnar nerve symptoms in both elbows, which increases the functional impairment to each extremity. They also contend claimant refused to accept accommodated work that was offered by respondent. Finally, in the alternative, they argue claimant's average weekly wage is $434 for an accident on November 19, 1996, which they assert is the first date that claimant missed work as a result of his upper extremity injuries before having left carpal tunnel surgery.

Accordingly, respondent and its insurance carrier request the Board find two specific dates of accident, determine the average weekly wage for each accident, and award claimant separate benefits for each of those two injuries under the scheduled injury statute.[1] They request the Board to award claimant permanent disability benefits for a 26 percent functional impairment to the right upper extremity and permanent disability benefits for an eight percent functional impairment to the left upper extremity. In the alternative, they request the Board to find claimant's date of accident to be November 19, 1996, rather than August 23, 1999, and to find the average weekly wage to be $434.

The issues before the Board on this appeal are:

1. Did claimant sustain two scheduled injuries or one non-scheduled injury?

2. What is the appropriate date or dates of accident?

3. Did claimant refuse a bona fide offer to return to accommodated work that was within his work restrictions and limitations following his last surgery of August 1999?

4. What is the nature and extent of claimant's injuries and disability?

5. What is claimant's average weekly wage for determining his award?

---

[1] K.S.A. 1999 Supp. 44-510d.

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. In 1990, claimant began working for respondent in Coffeyville, Kansas, as a welder, repairing railroad cars. The work required claimant to perform heavy physical labor and operate vibratory tools such as impact wrenches and grinders.

2. In approximately 1996, claimant began having symptoms of pain and numbness in his hands, wrists and arms, with the left upper extremity being worse than the right. In the fall of 1996, claimant saw the company physician, Dr. Paul S. Sandhu, after injuring a knuckle on his right hand when a pry bar slipped. While there, claimant told Dr. Sandhu about the symptoms that he was experiencing in his hands and arms. The doctor then began treating claimant for carpal tunnel syndrome and in November 1996 operated on claimant, releasing the left carpal tunnel.

3. This was not claimant's first experience with upper extremity problems as he had undergone right carpal tunnel release surgery in the late 1970s. Claimant, however, had a good recovery from that surgery as his right upper extremity was asymptomatic until 1996, when he began having bilateral upper extremity symptoms.

4. Following the November 1996 left carpal tunnel release, claimant was off work for approximately five weeks. Claimant returned to work for respondent and resumed his regular job duties as a car man. As he continued to work, claimant experienced more symptoms in his upper extremities.

5. Because of his increasing symptoms, in approximately September 1997 claimant returned to Dr. Sandhu. Dr. Sandhu referred claimant for nerve conduction tests. According to claimant, the doctor who performed those tests advised claimant that he needed immediate surgery in both upper extremities.

6. Claimant was referred to Dr. George Lucas, a board-certified orthopedic surgeon in Wichita, Kansas. Dr. Lucas first saw claimant in April 1998 and thought claimant had possible bilateral carpal tunnel syndrome and bilateral ulnar nerve syndrome. After a period of conservative treatment, in January 1999 Dr. Lucas operated on claimant's left elbow.

7. Following the left elbow surgery, claimant was off work from about January 12 to May 10, 1999, or approximately four months. According to claimant, he performed his regular work duties until the January 1999 left elbow surgery, but when he returned to work in May 1999, respondent gave him lighter duties that included some janitorial duties along with some duties in the barn where respondent rebuilt parts from the railroad cars.

8. After returning to work on May 10, 1999, claimant worked for respondent for several months until an unknown date in late summer of 1999, when the plant supervisor sent claimant home after he advised he could not shovel sand out of a box car because his arms were hurting.

9. Although the record does not disclose claimant's last day of working for respondent, that date was sometime before August 24, 1999, when claimant underwent his last surgery. In that surgery, Dr. Lucas released the right carpal tunnel, moved the ulnar nerve in the right elbow, and removed a cyst on claimant's right hand.

10. While recovering from the August 1999 surgery to the right upper extremity, Dr. Lucas initially restricted claimant's work activities to light work only, no vibratory tools, no twisting with his hands, and no lifting greater than 10 to 20 pounds.

11. In October 1999, respondent offered claimant three temporary light duty jobs. As described by respondent's human resources director, Walter Keener, the jobs were temporary and only expected to last for one or two weeks and also they would only pay 70 percent of claimant's pre-injury wage.[2] One required typing, but claimant felt unqualified to perform that job as he did not know how to type. The second required using a computer, but claimant felt unqualified to do that job as he had no computer experience. The third job was with the Salvation Army. All three jobs were described by Mr. Keener as being "rehabilitative" positions, where claimant would work for a short period before returning to his regular job duties as a car man.

12. At no time following the August 1999 surgery did respondent offer claimant a job, janitorial or otherwise, in the Coffeyville facility. The plant manager, Gary Rickner, testified that he did not offer claimant such a job.[3] Moreover, Mr. Keener testified that he did not even ask Mr. Rickner if the janitorial position was available at that time and that later on, when he did check with Mr. Rickner, there was no light duty work available at the Coffeyville facility.[4] Furthermore, Mr. Keener considered the janitorial job that claimant had previously performed and determined that it was not within claimant's restrictions. Mr. Keener testified, in part:

> That is correct, although I do want to go on to say that I did look into the type of work we had accommodated him for the first time as a possibility later on; and it would not fit with - and part of his duties before included driving the forklift [sic] as

---

[2] Keener Depo. at 16.

[3] Rickner Depo. at 18.

[4] Keener Depo. at 13.

> well as performing these janitorial duties; and in conversations with the physician, that did not fit the restrictions because of the vibration of the forklift [sic].[5]

13. Claimant initially accepted the Salvation Army job until he was advised that it only paid 70 percent of his pre-injury wage. Claimant then advised Mr. Keener he needed to contact his attorney. At that point, claimant's attorney and respondent and its insurance carrier's attorney began discussing details of claimant's return to work and the wages that he would be paid. With knowledge of those ongoing discussions on the part of both Mr. Keener and Mr. Rickner, on November 8, 1999, respondent wrote claimant that he was terminated. The termination letter, which was drafted by Mr. Keener, was signed by Mr. Rickner.

14. On November 9, 1999, before receiving the termination letter, claimant telephoned Mr. Keener and advised that he would accept the Salvation Army job. Mr. Keener advised claimant the job was no longer available as claimant had been terminated but he could apply for employment with Mr. Rickner. On November 19, 1999, claimant presented to Mr. Rickner a written application for employment. Claimant was not hired. Mr. Rickner testified that claimant was not hired as he had written on the application that he desired the car man position but his restrictions prevented him from doing that job. Apparently, nothing was discussed in the interview and application process about the temporary job with the Salvation Army.

15. After termination, claimant saw Dr. Lucas on March 9, 2000, for the final time. According to a letter from Dr. Lucas dated May 12, 2000, claimant is permanently limited and restricted to light work activities, with limited lifting and no vibratory tools. The doctor believes claimant has a 27 percent functional impairment to the right upper extremity and an eight percent functional impairment to the left upper extremity under the fourth edition of the American Medical Association's *Guides to the Evaluation of Permanent Impairment* (AMA *Guides*).

16. Dr. Lucas reviewed a list of the work tasks that claimant performed in the 15-year period before developing the bilateral upper extremity injuries, which are the subject of this claim. According to Dr. Lucas, claimant has lost the ability to perform nine of the 16 tasks, or approximately 56 percent, due to his upper extremity injuries.

17. Claimant was also evaluated by Dr. William Smith, who first saw claimant in June 1997 and later in September 2000. According to Dr. Smith, claimant has a 25 percent functional impairment to the right upper extremity and a 20 percent functional impairment to the left upper extremity under the AMA *Guides*. The Judge converted those ratings to whole body functional impairment ratings and then combined the whole body ratings using

[5] Keener Depo. at 54.

the AMA *Guides*. Accordingly, the Judge determined claimant sustained a 25 percent whole body functional impairment rating. Dr. Smith also reviewed the list of claimant's former work tasks and testified that claimant had lost the ability to perform 10 of the 16 tasks, for a loss of approximately 63 percent.

18. When claimant last testified in this claim at a hearing in November 2000, he had not worked since being terminated by respondent. Claimant introduced a calendar upon which he had noted his repeated trips to the unemployment office seeking job leads and the businesses he had contacted. Despite his efforts, claimant has been unable to find work. The Board finds claimant has made a good faith effort to find appropriate employment.

19. Claimant's relationship with respondent's plant manager, Mr. Rickner, deteriorated beginning in 1996 with the news that claimant needed left carpal tunnel surgery. Claimant testified that Mr. Rickner even threatened his job.

> Q. (Mr. Smith) Sir, were you ever threatened or did you ever feel like that if you pursued any work comp claims at Watco that your job might be in jeopardy?
>
> A. (Claimant) Yes, sir.
>
> Q. And why do you say that?
>
> A. The day that I had explained to Gary Rickner that I had to have carpal tunnel done to my left hand he told me if I valued my job that I would not have it done and would not draw workmen's comp. And I told him, I said, "Gary, I have to have it done because it hurts and I need it done so that way I can do my job proper." And he said, "Well, if you do, you will lose more than you gain."[6]

That testimony is uncontradicted. Furthermore, claimant's testimony that he was brought into a supervisor's office and screamed at because he was injuring himself is also uncontradicted, along with claimant's testimony that after he began having upper extremity problems he was subjected to abusive language and treated in a demeaning manner.

20. The Board affirms the Judge's finding that claimant sustained a 25 percent functional impairment to the whole body due to the injuries that he sustained to both upper extremities while working for respondent. The Board also finds that claimant has sustained a 60 percent task loss, which is an approximate split of the 56 percent task loss percentage from Dr. Lucas and the 63 percent task loss percentage from Dr. Smith. Furthermore, the Board finds claimant has a 100 percent wage loss as he is unemployed.

---

[6] Continuation of R.H. at 25.

21. For an August 1999 accident, claimant's average weekly wage is $478 per week. In the written stipulation filed on February 12, 2001, with the Division of Workers Compensation, the parties agreed that claimant was a full-time employee and was earning $11.10 per hour as of January 12, 1999, and that claimant received additional compensation items totaling $34 per week. That is the best evidence in the record for determining claimant's average weekly wage and, therefore, that evidence will be used for the August 1999 accident.

CONCLUSIONS OF LAW

The Award should be modified to award claimant an 80 percent permanent partial general disability, which is based upon a 60 percent task loss and a 100 percent wage loss.

The Board concludes that claimant has sustained simultaneous injury to both the left and right upper extremities while working for respondent. The Board concludes the heavy physical labor that claimant performed for respondent repairing the railroad cars caused claimant to develop carpal tunnel syndrome in both upper extremities and ulnar nerve syndrome in both elbows. As claimant continued to perform certain aspects of that work up until the time of his August 24, 1999 right carpal tunnel and right ulnar nerve surgery, the Board affirms the August 23, 1999 accident date found by the Judge. The Board notes that the record does not disclose the actual date that claimant last worked for respondent. Therefore, August 23, 1999, will be the date used. The fact the surgeries were performed at different times is irrelevant.[7]

Because claimant's injuries comprise a "non-scheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1999 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

[7] See *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 947 P.2d 1 (1997).

But that statute must be read in light of *Foulk*[8] and *Copeland*.[9] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual wages being received when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[10]

As indicated above, the Board finds claimant has made a good faith effort to find appropriate employment following his August 1999 surgery. Conversely, the Board concludes that respondent failed to deal with claimant in good faith and terminated him, knowing that the parties' attorneys were trying to work out the details concerning claimant's return to work. Furthermore, the record is uncontradicted that respondent's treatment of and attitude towards claimant changed after he notified respondent of needing the left carpal tunnel surgery. Not only was claimant's employment directly threatened, but he was also subjected to abusive language, yelled at for injuring himself, and otherwise treated in a demeaning manner.

As claimant has demonstrated good faith following the August 1999 surgery, his actual wage loss of 100 percent should be used to calculate his permanent partial general disability.

Averaging the 60 percent task loss with the 100 percent wage loss yields an 80 percent permanent partial general disability, which claimant is entitled to receive in this claim.

---

[8] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[9] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[10] *Copeland*, at 320.

AWARD

WHEREFORE, the Board modifies the March 6, 2001 Award and increases claimant's permanent partial general disability from 25 percent to 80 percent and increases the average weekly wage for purposes of computing claimant's benefits from $444 to $478.

Ronald D. Smith is granted compensation from Watco and its insurance carrier for an August 23, 1999 accident and resulting disability. Based upon an average weekly wage of $478, Mr. Smith is entitled to receive four weeks of temporary total disability benefits at $318.68 per week, or $1,274.72, plus 309.79 weeks of permanent partial disability benefits at $318.68 per week, or $98,725.28, for an 80 percent permanent partial general disability and a total award not to exceed $100,000.

As of September 25, 2002, there is due and owing to the claimant four weeks of temporary total disability compensation at $318.68 per week in the sum of $1,274.72, plus 157.29 weeks of permanent partial general disability compensation at $318.68 per week in the sum of $50,125.18, for a total due and owing of $51,399.90, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $48,600.10 shall be paid at $318.68 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of September 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Patrick C. Smith, Attorney for Claimant
Janell Jenkins Foster, Attorney for Respondent and its Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Director, Division of Workers Compensation